

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

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<i>In re</i>)	CONSOLIDATED DOCKET NO.
DISTRIBUTION OF CABLE)	14-CRB-0010-CD
ROYALTY FUNDS)	(2010-13)
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CTV'S INITIAL BRIEF IN RESPONSE TO THE JUDGES' JUNE 29, 2018 ORDER

The Commercial Television Claimants ("CTV") provide this initial brief in response to the Order issued by the Judges in this Allocation Phase Proceeding on June 29, 2018 (the "Order").

In the Order, the Judges request information and argument from the parties regarding the need for a mathematical adjustment to the Basic Fund shares of the Public Television Claimants ("PTV") in order to reflect PTV's ineligibility to receive any portion of the 3.75 royalty funds (the "Adjustment").

In sum, making such an Adjustment is warranted if the Judges follow their own precedent in *Distribution of the 2004 and 2005 Cable Royalty Funds*, 75 Fed. Reg. 57063 (Sept. 17, 2010) (the "2004-2005 Distribution Order"). CTV has already identified the precedential basis for applying the Adjustment, and has already provided the step-by-step calculations, including the Adjustment, to determine the 2010-2013 shares for all parties, in its Responses of the Commercial Television Claimants to Proposed Findings of Fact and Conclusions of Law, filed in this proceeding on April 27, 2018 ("CTV RPFF/PCL").¹

¹ In reviewing its Responses for purposes of preparing this Brief, CTV has discovered a typographical error in footnote 157, which should state that the adjustment factor for 2010-2013 is found in the record

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Following are CTV's responses to the specific question the Judges posed in their Order.

A. Legal and Regulatory Authority

The first case to address the allocation of royalties after the adoption of the 3.75% royalty rate was the *1983 Cable Royalty Distribution Proceeding*, 51 Fed. Reg. 12792 (Apr. 15, 1986). In that proceeding, the Copyright Royalty Tribunal determined that the Basic, 3.75, and Syndex royalties should be allocated as separate funds. 51 Fed. Reg. 12807-12808. The Tribunal held that PTV, whose signals had never been "non-permitted" by the FCC's distant signal rules and hence would never be carried at the 3.75 rate, was not eligible to receive any of the 3.75 royalties, and went on to determine allocations of the 3.75 Fund among eligible claimant groups based on evidence that had been presented by the parties regarding the signals carried at that rate. *Id.* at 12813-12814. The Court of Appeals affirmed the Tribunal's decision. *Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 809 F.2d 172, 178 & n.7 (2d Cir. 1986).

Of the five Allocation Phase determinations issued since the 1983 proceeding, all have affirmed that PTV may receive no 3.75 Fund royalties. In the *1989 Cable Royalty Distribution Proceeding*, 57 Fed. Reg. 15286 (Apr. 27, 1992), the Tribunal again concluded that PTV could receive no share of the 3.75 Fund. 57 Fed. Reg. at 15303. It rejected PTV's request that its adjusted Bortz share be calculated after "backing out" the 3.75 portion of the royalties, based on testimony that the Bortz survey respondents were not referring to royalty payments in making their "fixed budget" allocation responses.² *Id.* at 15300. But the Tribunal made its final

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of this proceeding in Exhibit 1101, not Exhibit 1001. See CTV RPFF/PCL p. 29 n.157. CTV apologizes for this inadvertent error.

² The Program Suppliers' viewing study, by contrast, included data that allowed viewing to stations carried at the 3.75 rate to be excluded, and the Tribunal did so as one of a number of adjustments it made to the viewing study shares. 57 Fed. Reg. at 15299.

allocation determinations based on consideration of quantitative evidence from both the Bortz survey and Program Suppliers' viewing study, and no such adjustment was directly reflected in the share awards. *Id.* at 15301-15302, 15304.

In the 1990-1992 Cable Royalty Distribution Proceeding, the first heard by an ad hoc Copyright Arbitration Royalty Panel, the CARP rejected PTV's request to have its adjusted Bortz share adjusted further "to allow for its non-participation in the 3.75 fund," for the same reason cited by the Tribunal in its 1989 decision. *1990-1992 CARP Report* (May 31, 1996) at p. 124 & n.539. On review, the Librarian of Congress held that the Panel did not act arbitrarily in rejecting PTV's proposed adjustment, but went on to say that "[h]ad the Panel stated that it was attempting to award PBS its Bortz share, then PBS's argument might have some validity." *Distribution of 1990, 1991 and 1992 Cable Royalties*, 61 Fed. Reg. 55653, 55668 (Oct. 28, 1996).

In the 1998-1999 Cable Royalty Distribution Proceeding, the CARP expressly agreed with PTV that its Bortz share "should be adjusted upward to account for PTV's non-participation in the 3.75% or Syndex funds." *1998-1999 CARP Report* (Oct. 21, 2003) at p. 26 n.10. But the CARP also rejected PTV's argument that such an adjustment should be made if allocations are based on any methodology other than "a CSO survey where the respondents are allocating a fixed budget among the various claimant groups." *Id.* In any event, in its ultimate awards, the 1998-1999 CARP did not make such an adjustment in PTV's Basic Fund award share, since it decided to award PTV the same final Basic share it had been awarded for 1991-1992 rather than basing the PTV award on its 1998-1999 Bortz survey share. *Id.* at p. 69; *see Distribution of 1998 and 1999 Cable Royalty Fund*, 69 Fed. Reg. 3606, 3609 (Jan. 26, 2004) (affirming CARP Report).

In the next Allocation Phase case, *Distribution of the 2000-2003 Cable Royalty Funds*, 75 Fed. Reg. 26798 (May 12, 2010), the Judges noted the Tribunal's 1983 exclusion of PTV from any award of 3.75 royalties, but only for the purpose of rejecting the argument that "fee generation" evidence could never be considered in making an allocation determination. 75 Fed. Reg. at 26803. Because of the limited nature of the issues to be determined in that proceeding, however, the Judges were not presented with and did not decide whether to base the royalty allocations on Bortz survey results, whether a non-participation adjustment should be made in PTV's Bortz survey share, or, indeed, what Basic Fund share to award for PTV at all. *See id.* at 26799, 26807.

Finally, in the most recent Allocation Phase determination, for 2004-2005, the Judges expressly incorporated the proposed Adjustment in determining PTV's Basic share. In their *2004-2005 Distribution Order*, the Judges explained that they used "as our starting point the augmented Bortz survey shares as calculated by Ms. McLaughlin which includes appropriate adjustments to the PTV Share at SP PFF at ¶317." 75 Fed. Reg. at 57070 (footnote omitted). The cited reference, Paragraph 317 of the Settling Parties' Proposed Findings of Fact (Corrected Proposed Findings of Fact and Conclusions of Law of the Settling Parties, No. 2007-3 CRB CD 2004-05 at 129-130 (Mar. 24, 2010)), read in its entirety as follows:

317. Both the unadjusted and augmented Bortz survey results show the percentage value of all royalties – Basic, 3.75 and Syndex – paid by the surveyed cable systems that the respondents assign to each programming type. Because PTV receives payments from only the Basic fund, an adjustment to the augmented survey results is needed to produce PTV's share of the Basic fund, as recognized by the CARP in the 1998-1999 Proceeding.⁷⁵¹ This adjustment divides the augmented PTV results by the percent of Form 3 royalties in the Basic fund: 85.0 percent in 2004 and 85.9 percent in 2005.⁷⁵² The results of this further adjustment are shown in the table below.⁷⁵³

**Augmented Bortz Survey
Relative Value of Basic Fund Distant Signal Programming,
By Claimant Group in This Proceeding**

Programming	2004 Share	2005 Share
Sports	32.1	35.2
News	17.7	14.1
Public Television	7.3	7.1
Settling Parties (except Music)	57.1	56.4
Syndicated	17.9	17.5
Movies	17.1	18.3
Program Suppliers	35.0	35.8
Devotional	7.5	6.3
Canadian	0.5	1.7

751 *See* 1998-99 CARP Op. at 26 n.10 ("The Panel agrees ... that PTV' s
Bortz share should be adjusted upward to account for PTV' s non-participation
in the 3.75% or Syndex funds.").

752 *See* McLaughlin WDT (SP Ex. 6) at 12 (based on data provided by CDC).

753 *See* McLaughlin WDT (SP Ex. 6) at 11-12 (Chart 5) (Sports, News, and
Public Television shares combined into Settling Parties' share, and Syndicated
and Movies shares combined into Program Suppliers' share).

The Judges thus based their 2004-2005 Basic Fund allocation determinations on augmented Bortz survey results that incorporated an Adjustment reflecting PTV's non-participation in the 3.75 Fund awards,³ calculated simply by dividing the PTV augmented Bortz survey result share by the percentage of total royalties represented by just the Basic Fund royalties for each royalty year, and then adjusting the remaining shares downward to sum to 100%.⁴

³ The Judges affirmed this non-participation in determining the award shares of the 2004-2005 3.75 Funds. *2004-2005 Distribution Order*, 75 Fed. Reg. at 57071.

⁴ The Judges noted that the sum of the rounded Basic shares resulting from Ms. McLaughlin's adjustments, as reported in the chart from SP PFF ¶317 reproduced above, summed to slightly over 100.0%, and adjusted them proportionately downward. 75 Fed. Reg. at 57070 n.19.

The Judges then went on to make additional adjustments to the 2004-2005 Canadian, Devotional, and Program Suppliers shares that were not calculated explicitly on the basis of quantitative record evidence, and to add an award for the Music Claimants, all of which further modified the final Basic Fund award for PTV (and other claimant categories).⁵ But it is clear that the Judges started with Bortz shares that expressly incorporated an Adjustment to reflect PTV's non-participation in the 3.75 Fund.

In the step-by step share calculations previously presented by CTV (*see* CTV RPFF/PCL ¶ 32), and again in the calculations presented below, CTV proposes that the Judges follow the same logical approach followed by the Judges in the 2004-2005 proceeding determinations, except that (1) the adjustments of the Bortz survey shares for Canadian, Devotional, and Program Suppliers should be determined based on quantitative evidence in the record of this proceeding, and (2) for clarity, the PTV non-participation Adjustment may be made at a later point in the step-by-step calculations of the parties' respective Bortz survey shares.

B. References to Record Evidence

As in prior Allocation Phase proceedings, described above, the 2010-2013 Bortz survey of cable system operators measures the relative value of programming on the distant signals they carried, without regard to the royalty rate paid for any particular signal.⁶

Record evidence to support the calculation of the Adjustment is found in Exhibit 1101, presenting the "Nonparticipation Factors" calculated by Ms. McLaughlin for purposes of adjusting the PTV Basic share to reflect its non-participation in the 3.75 Funds. *See* Tr. 2477-

⁵ *See* 75 Fed. Reg. 57070-57071 & n.20.

⁶ *See* Ex. 1001.

2478 (McLaughlin). The factors, which represent the percentage of total Form 3 royalties for the first accounting period of each year that were Basic Fund royalties, according to Cable Data Corporation, were as follows:⁷

Accounting Period	Nonparticipation Factor
2010-1	87.10%
2011-1	85.33%
2012-1	85.34%
2013-1	87.30%

The subsequent adjustment of the Basic Fund shares of the remaining parties is a simple mathematical calculation to set all shares to total 100% after adjusting the PTV share, and does not require reference to record evidence.

C. Step-By-Step Calculations

CTV repeats below the calculation steps it presented at CTV RPFF/PCL ¶32, with clarifications added where appropriate in response to the Judges' Order:

Following the approach of the Judges in the 2004-2005 Distribution Order,⁸ with changes as noted to reflect the 2010-2013 record, the shares for each party should be calculated as follows:

- a. Begin with the Bortz shares as augmented by PTV witness McLaughlin.⁹ For purposes of the calculation, we take the midpoint of the ranges calculated by Ms.

⁷ Ex. 1101. As noted in CTV RPFF/PCL n.157, these percentages may differ slightly from the current Copyright Office figures for the relative composition of these funds.

⁸ *2004-2005 Distribution Order*, 75 Fed. Reg. 57063, 57070-71, 57073-75, and 57078-79 (Sept. 17, 2010).

⁹ *See 2004-2005 Distribution Order*, 75 Fed. Reg. at 57070.

McLaughlin for PTV and CCG in 2011, 2012, and 2013.¹⁰

Augmented Bortz Shares				
	2010	2011	2012	2013
Sports	39.0%	34.2%	37.0%	36.1%
News	17.8%	17.2%	22.3%	21.7%
Movies	15.1%	17.5%	14.9%	14.8%
Syndicated Shows	15.2%	16.3%	13.2%	11.3%
PTV	7.5%	8.7%	6.9%	9.1%
Devotional	3.8%	4.2%	4.6%	4.8%
Canadian	1.6%	1.8%	1.2%	2.0%

- b. Make reductions in the augmented Bortz shares to account for substantial amounts of non-compensable programming on WGNA that respondents to the Bortz Survey could not be expected to have excluded from their responses.¹¹ Compared with the evidence in the 2004-2005 case, the evidence in this proceeding shows both a larger amount of non-compensable PS and Devotional programming on WGNA¹² and a regression share for each of those categories that is lower than its Bortz share.¹³ In their 2004-2005 Final Determination, the

¹⁰ Ex. 1101. Ms. McLaughlin calculated both minimum and maximum augmented shares for PTV and Canadian programming in certain years, based on an assumption that all the value on systems that carried both a PTV and a Canadian signal as their only distant signals would be assigned to one or the other. Tr. 2458, 2462 (McLaughlin). For purposes of calculating the award shares, we use the midpoint of these minimum/maximum ranges for PTV and CCG for 2011, 2012, and 2013.

¹¹ See *2004-2005 Distribution Order*, 75 Fed. Reg. at 57070 & n. 20, 57074.

¹² Ex. 1002 (Trautman WRT) at p. 14 Table 4 (decline in compensable WGNA PS programming from 21.7% in 2004-2005 to 4.1% in 2010-2013), p. 28 Table 7 (decline in compensable WGNA SDC programming from 10.0% in 2004-2005 to 8.7% in 2010-2013). The issue was not completely addressed by improvements in the Bortz Survey methodology, because between 50% and 70% of systems carried distant signals as well as WGN, and could thus not be administered the questionnaire that provided specific information about the compensable programming on WGN about which they were being asked. CTV PFF ¶ 121; Ex. 1001 at pp. 47-49 & Table IV-6.

¹³ *2004-2005 Distribution Order*, 75 Fed. Reg. at 57070, 57074. In this proceeding, the PS and SDC shares were lower than their Bortz shares in both the Crawford and the Israel regressions. Ex. 1087 (Israel WRT) at p. 6 & Table 1.

Judges did not spell out the quantitative basis on which they made reductions in the PS and Devotional shares.¹⁴ For 2010-2013, we propose reductions equivalent to half the difference between the Augmented Bortz shares for PS and Devotional and their Crawford final regression shares:¹⁵

Adjusted PS Shares				
	2010	2011	2012	2013
Augmented Bortz	30.3%	33.8%	28.1%	26.1%
Crawford	27.1%	24.7%	22.5%	19.7%
Adjusted Share	28.7%	29.2%	25.3%	22.9%

Adjusted Devotional Shares				
	2010	2011	2012	2013
Augmented Bortz	3.8%	4.2%	4.6%	4.8%
Crawford	1.1%	0.7%	0.6%	0.5%
Adjusted Share	2.4%	2.5%	2.6%	2.7%

- c. Increase the Augmented Bortz shares for Canadian Claimants in light of the relatively small number of respondents who could have been included at all in the Bortz Survey numbers and the higher share measured by the regression studies.¹⁶ Again, we propose adjustments equivalent to half the difference between CCG's Augmented Bortz share and its Crawford final regression shares:¹⁷

¹⁴ 2004-2005 Distribution Order, 75 Fed. Reg. at 57070 & n. 20, 57074.

¹⁵ Ex. 2004 (Crawford WDT) at ¶156 & Figure 20.

¹⁶ See 2004-2005 Distribution Order, 75 Fed. Reg. at 57073.

¹⁷ The Judges in the 2004-2005 case used fees generated to establish a “ceiling” for the Canadian share, *id.* at 57072-57073, but use of the Crawford regression results provides a consistent basis for all share adjustments.

Adjusted Canadian Shares				
	2010	2011	2012	2013
Augmented Bortz	1.6%	1.8%	1.2%	2.0%
Crawford	4.1%	4.0%	4.2%	4.7%
Adjusted Share	2.9%	2.9%	2.7%	3.3%

- d. Proportionally adjust the Augmented Bortz shares (combining Movies and Syndicated into PS) to reflect the adjusted shares for PS, Devotionals, and CCG:¹⁸

Adjusted Augmented Bortz Shares				
	2010	2011	2012	2013
JSC	40.20%	37.73%	39.01%	38.72%
CTV	18.35%	18.97%	23.51%	23.27%
PS	28.7%	29.2%	25.3%	22.9%
PTV	7.50%	8.70%	6.90%	9.10%
Devotional	2.4%	2.5%	2.6%	2.7%
Canadian	2.9%	2.9%	2.7%	3.3%

- e. Finally, after the above adjustments are made, further adjust the adjusted Augmented Bortz shares for differences in participation across the Basic and 3.75% Funds. Due to PTV's lack of participation in the 3.75% Fund, PTV's share of the Basic Fund is adjusted upwards and the other shares downwards.¹⁹

¹⁸ Cf. 2004-2005 Distribution Order, 75 Fed. Reg. at 57070 & n. 20, 57074.

¹⁹ See 2004-2005 Distribution Order, 75 Fed. Reg. 57063, 57074. The adjustments are performed by dividing the augmented PTV share shown in step "d." above for each year (7.50%, 8.70%, 6.90%, 9.10%) by the McLaughlin "Nonparticipation Factor" reproduced in Section B above from Ex. 1101 for each year (87.10%, 85.33%, 85.34%, 87.30%). Note that the Judges may wish to replace the "Nonparticipation Factors" in Exhibit 1101 with the current Licensing Division receipts figures as of the time of the decision.

Final Basic Fund Shares				
	2010	2011	2012	2013
JSC	39.7%	37.1%	38.5%	38.2%
CTV	18.1%	18.7%	23.2%	22.9%
PS	28.4%	28.7%	25.0%	22.6%
PTV	8.6%	10.2%	8.1%	10.4%
Devotional	2.4%	2.4%	2.6%	2.6%
Canadian	2.8%	2.9%	2.6%	3.3%

- f. Then, PTV is set to 0 in the 3.75% Fund, and the other parties' shares are adjusted proportionally:

Final 3.75 Fund Shares				
	2010	2011	2012	2013
JSC	43.4%	41.3%	41.9%	42.6%
CTV	19.8%	20.8%	25.3%	25.6%
PS	31.0%	32.0%	27.2%	25.2%
PTV	0.0%	0.0%	0.0%	0.0%
Devotional	2.6%	2.7%	2.8%	3.0%
Canadian	3.1%	3.2%	2.9%	3.7%

Because of the very small relative size of the Syndex Fund for 2010-2013,²⁰ and the fact that only Program Suppliers receives Syndex royalties, any nonparticipation adjustment would be inconsequential for the Basic and 3.75 shares of all the other parties. Accordingly, no such adjustment is necessary.

D. Additional Evidence

CTV believes that no further evidence or testimony is necessary to fully determine the allocations for the 2010-2013 Basic, 3.75, and Syndex Funds.

²⁰ See Ex. 1101 (Syndex "Nonparticipation Factor" is 99.99%).

Respectfully submitted,

**COMMERCIAL TELEVISION CLAIMANTS
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Dated: July 16, 2018

Proof of Delivery

I hereby certify that on Monday, July 16, 2018 I provided a true and correct copy of the CTV's Brief in Response to the Judges June 29, 2018 Order to the following:

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